Filed 1/29/19 In re A.Z. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.Z., a Person Coming Under the Juvenile Court Law.	B290477 (Los Angeles County Super. Ct. No. DK16679B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSE S. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Steff R. Padilla, Juvenile Court Referee. Affirmed in part and conditionally reversed in part with directions.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant Jose S.

Jill Smith, under appointment by the Court of Appeal, for Defendant and Appellant Joanna Z.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Jose S. (father) is a nonoffending, noncustodial parent. He appeals the denial of his petition filed under Welfare and Institutions Code section 388[1] seeking either custody of A.Z. (minor) or reunification services, and he also appeals the termination of his parental rights.[2] Joanna Z. (mother) joins father's appeal of the termination of parental rights. Upon review, we affirm the denial of father's section 388 petition. We conditionally reverse the termination of parental rights and

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] As part of his appeal of the order terminating parental rights, father seeks review of a purported earlier ruling denying him custody.

direct the trial court to comply with the provisions of the Indian Child Welfare Act (ICWA).[3]

FACTS

Minor was born in December 2014.

On April 26, 2016, the Department of Children and Family Services (Department) filed a petition under section 300, subdivisions (a), (b) and (j) on behalf of minor and his sister[4] based on allegations that mother physically abused the sister, exposed minor and his sister to violent altercations between mother and minor's maternal grandmother and maternal grandfather, left minor and his sister at home alone without adult supervision, and was unable to provide adequate supervision and care for minor and his sister due to her use of alcohol, amphetamine, methamphetamine and marijuana. On the same date, mother signed a Los Angeles Superior Court Parentage Questionnaire stating that the identity of minor's father was unknown.

In June 2016, the juvenile court sustained the petition and removed minor and his sister from mother's custody. As to minor's sister, the juvenile court terminated jurisdiction and entered a custody order placing her with her father. As to minor, the juvenile court ordered him suitably placed. In addition, it ordered reunification services for mother and granted her monitored visitation. Father was unidentified and, as a consequence, was not offered reunification services.

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[3] Title 25 United States Code section 1901 et seq.

[4] Minor's sister is not a subject of this appeal. She and minor do not share the same father.

At the six-month review, the juvenile court found that mother had made minimal progress in resolving the issues that led to minor's removal. Still, the juvenile court continued reunification services.

In its status review report for the 12-month review hearing, the Department recommended termination of mother's reunification services. It claimed she had not complied with the case plan because she did not attend a full drug treatment program, a 12-step program with sponsorship, individual counseling, an anger management program, and Mommy and Me classes. In addition, she had not submitted to drug and alcohol screening.

On June 26, 2017, the 12-month review was continued to July 28, 2017 for a contested hearing. On July 28, 2017, father appeared for the first time. The juvenile court ordered a DNA test to confirm whether he was minor's biological parent. The 12-month review was continued pending the test results.

The continued review hearing took place on September 22, 2017. Father was present. The juvenile court declared father to be the presumed father.[5] Father's counsel requested a home assessment for father's home as well as a prerelease investigation report (PRI). According to father's counsel, father learned about the dependency case through a friend and came forward as soon as possible. Further according to counsel, "His previous efforts to have contact with [minor] were thwarted." The juvenile court asked counsel where father had thought minor was located. Counsel replied, "[H]e knew his child was in this area; however,

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[5] Though not stated in the record, the DNA test apparently proved father is minor's biological parent.

. . . he wished to be present at the birth and wished to visit with the child after the child was born, and the mother . . . threatened . . . that her family members or friends would physically harm my client if he tried to visit with the child." The juvenile court indicated that it would direct the Department to contact the child welfare agency in Nevada where father lived and ask it to do a home assessment study. Pending that study, counsel requested that father have visitation. The juvenile court granted that request. After noting that mother was currently incarcerated and had not complied with multiple aspects of her case plan, the juvenile court terminated mother's reunification services and set a section 366.26 hearing for January 19, 2018. In addition, it set a permanency planning review hearing for March 2018.

The juvenile court ordered the Department to provide mother and father with notice of the section 366.26 hearing, and also ordered the Department to provide father with "writ notice." The juvenile court clerk personally served father with notice of entry of the order and "Petition for Extraordinary Writ form(s)." For the record, the juvenile court stated, "Father has been served with the writ notice as well as the [section 366.26 hearing] notice."

In 2017, father had six 3-hour visits with minor at a Department office. Mother reported to a social worker that she and father agreed to split custody of minor if father was awarded custody. Regardless of what the juvenile court ordered, according to mother, she would have custody on week days and father would have custody on weekends.

On January 10, 2018, father filed a section 388 petition to modify the June 2016 orders that minor be suitably placed and that father be denied reunification services. For changed

circumstances, he stated that he appeared in the case, signed a voluntary declaration of paternity, and had been regularly visiting minor. He requested orders vacating the section 366.26 hearing and permanency planning review hearing. Also, he requested custody of minor or, in the alternative, reunification services. As to why the new orders would be in minor's best interest, father stated that he was able and willing to provide a stable home.

Due to the section 388 petition, the section 366.26 hearing was continued.

In March 2018, the Department reported that minor's caregivers had provided him with a safe and stable home. The caregivers were dedicated to adopting him, and he identified them as mommy and daddy. Minor was well bonded with his caregivers and their family.

On March 23, 2018, in a minute order, the juvenile court expressly found by a preponderance of the evidence that returning minor to the custody of his parents would create a substantial risk of detriment to minor.

The Department filed a status review report.

According to the Department, giving father custody of minor would be detrimental to minor's safety and well-being. In support, the Department provided a long list of reasons, including: father had a prior criminal case; he had not complied with the terms of his probation and/or parole (which included random drug testing); he had a long history of substance abuse but had not completed a substance abuse program; he had an active No Bail Warrant for his arrest in California since 2014; he had fathered four children; he had not seen his older three

children in five years; and during visits, minor showed no attachment to father.

Father made the following statements to a social worker. If he had custody of minor and was arrested, his fiancée would take care of minor. He also said that according to his probation officer, he would only be gone for a week if he was arrested. Regarding his drug history, he stated that he used marijuana from 2009 until 2015 or 2016 (with one recent lapse), and he used methamphetamines in 2012 to 2013 until he was arrested. He claimed that he was no longer using methamphetamines.

The parties convened on April 24, 2018. Father's counsel indicated that father had visited minor. But then father lost his job and could no longer afford to travel to the Los Angeles area for more visits. In addition, father's home was never assessed. Per counsel, father requested custody or reunification services. Also, he was requesting "an opportunity to show that he, with the proper support, is willing to do whatever he can to have [minor] in his care[.]" Minor's counsel stated, ". . . I could join with father's arguments except for the following reasons: When the father lost his job, he stopped all contact with the Department as well. According to the social worker's report, . . . the father was in touch with paternal relatives . . . , and they purportedly had information how he could reach the social worker. [¶] He just seemed to fall off the face of the earth after he lost his job. He had . . . visits, and apparently the visits went really well. . . . But the fact that father has not had any contact with [minor] since December 18, 2017, is not only perplexing, but I believe fuels the arguments that this [section 388 petition] should not be granted."

The juvenile court indicated that though father "was told what he needed to do" he nonetheless had no visits since the end

of the prior year. It found that there was no substantial change in circumstances, and that it would not be in minor's best interest if the section 388 petition was granted. The juvenile court added: "[I]t's also contrary to the law."

Next, the juvenile court terminated mother's and father's parental rights. On the record, the juvenile court stated, "The [juvenile] court finds that it would be detrimental to return this child to the parents." In the written order terminating parental rights, the juvenile court stated, "The [juvenile court] finds that it would be detrimental to [minor] to be returned to the parents."

On June 4, 2018, father appealed the April 24, 2018, findings and orders.

DISCUSSION

Father argues that (1) pursuant to section 361.2, the juvenile court should have awarded father custody of minor at the September 22, 2017 hearing; (2) it was an abuse of discretion to deny his section 388 petition; (3) his due process rights were violated because there was no detriment finding prior to the order terminating parental rights; and (4) there was no inquiry into his possible Indian heritage.

I. The September 22, 2017 Hearing.

According to father, he is a nonoffending parent who was entitled to custody of minor pursuant to section 361.2 at the September 22, 2017 hearing. The problem is he did not ask for custody at the September 22, 2017 hearing. Rather, he asked for a home assessment study and PRI.

Even if his request for a home assessment and PRI can be construed as a request for custody denied by the juvenile court, the issue is not reviewable.

Section 366.26, subdivision (*l*)(1) provides that an order setting a section 366.26 hearing cannot be appealed unless, inter alia, the aggrieved party first filed a timely petition for extraordinary writ review and that petition was denied. Case law establishes that the Legislature intended to apply the "bar of section 366.26, subdivision (*l*) [to] *all* orders issued at a hearing at which a setting order is entered." (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023.) Father did not file a petition for extraordinary writ review. Thus, absent an exception to the rule, the purported order is not reviewable.

Father relies on an exception.

Section 366.26, subdivision (*l*)(3) provides that after a juvenile court sets a section 366.26 hearing, the juvenile court must advise the parties to file a petition for extraordinary writ review to preserve any right to appeal. (§ 366.26, subd. (*l*)(3).) But if a parent was not given notice of his right to seek relief by writ petition, a reviewing court may review the order setting the section 366.26 hearing and any collateral orders in connection with an appeal from the termination of parental rights. (*In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110.) Father contends that the juvenile court did not orally advise him that he needed to comply with section 366.26, subdivision (*l*)(1) to obtain review and therefore the issue is reviewable in connection with this appeal. We disagree.

The notice of entry of order states that the juvenile court clerk personally served father with the notice of entry of the September 22, 2017 minute order, and "Petition for Extraordinary Writ form(s)." In addition, the juvenile court instructed the Department to provide father with writ notice. The record indicates father was given written notice. He cites no

law establishing that written notice is insufficient and oral notice is otherwise mandatory.

Father avers that "it is not clear what writ forms [he] was served with, as specific forms are not listed in the clerk's" notice. But this does not establish that the notice he received was inadequate. As the Department states, "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) We therefore presume the juvenile court and juvenile court clerk provided proper notice. Father has offered no evidence to rebut this presumption.

II. Section 388.

Father contends the juvenile court abused its discretion by denying his section 388 petition. By way of that petition, he sought custody of minor or reunification services as well as orders vacating the section 366.26 hearing and permanency planning review hearing.

Under section 388, a parent can petition the juvenile court to change, modify or set aside a previous order. The parent has the burden of showing, by a preponderance of the evidence, there is a change of circumstances or new evidence, and also that the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) "The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citations.)" (*Id.* at pp. 415–416; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) ""The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute

its decision for that of the trial court.'" [Citations.]" (*Id.* at pp. 318–319.)

For a section 388 petition to be granted, there "must be a substantial change in circumstances regarding the child's welfare[.]" (*In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.) The evidence did not show the requisite change in circumstances. Prior to the dependency case, father had no relationship with minor. Then, in 2017, when minor was two years old and turned three years old, father had only six visits. There were no visits in 2018. Regarding minor's welfare, it must be noted that father had an outstanding warrant since 2014 and that had not changed. Nor, apparently, had father complied with probation and/or parole terms such as mandatory drug testing. Thus, there was an inference that he still had an unresolved drug problem. The inferences indicated that there was not a substantial change in father's relationship with minor or in the facts related to minor's welfare. Given these facts and inferences, it was not an abuse of discretion for the juvenile court to find a lack of substantial changed circumstances.

We turn to the best interest inquiry.

A child's best interest depends upon multiple factors falling upon a continuum. One factor is the strength of the existing bond between parent and child. Conversely, another factor is the strength of the bond between the child and the existing caretakers. A juvenile court may examine the nature of the changed circumstances. Also, it may look at the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531–532.)

The record established that minor was strongly bonded with his caretakers, and that they were dedicated to adopting minor. Also, the evidence and inferences indicated that minor did not have a bond with father after only six visits. Further, the inferences indicated that father was not capable of providing adequate care for minor. Per mother, she and father agreed to split custody of minor regardless of what the juvenile court ordered. Thus, it appeared father lacked judgment about the risk mother posed to minor and was willing to put him at risk by allowing her partial custody. It also appeared that father was not willing to respect juvenile court orders. Beyond that, at the time of the hearing, father had a history of drug use, he had an outstanding warrant for his arrest in California, he had not complied with the terms of his probation and/or parole, his home had never been assessed, he did not have custody of his other three children, and he apparently did not have gainful employment. Based on these facts, and looking at them on a continuum, the juvenile court ruled within the bounds of reason when it ruled that granting the section 388 petition would not be in minor's best interest.

Father suggests the juvenile court may have misapplied the law when it denied the petition, gave its reasons, and then offhandedly said, "[I]t's also contrary to the law." It is unclear what the juvenile court meant. In any event, the juvenile court found there were insufficient changed circumstances and that granting the section 388 petition was not in minor's best interest. These findings were not dependent upon the juvenile court's subsequent remark. We conclude that the juvenile court applied the correct legal standard.

III. Due Process.

Parents have an interest in the care, companionship, and custody of their children. (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.) As a matter of due process, a juvenile court may not terminate a nonoffending, noncustodial presumed father's parental rights without finding by clear and convincing evidence that awarding custody to him would be detrimental to his child. (*Ibid.*; *In re T.G.* (2013) 215 Cal.App.4th 1, 20; *In re Z.K.* (2011) 201 Cal.App.4th 51, 65; *Santosky v. Kramer* (1982) 455 U.S. 745, 747–748 (*Santosky*) [announcing the rule that due process clause requires a state to support its allegations by clear and convincing evidence before it may irrevocably sever the rights of parents to their natural child].) The state bears the burden of proving parental unfitness. (*Ibid.*)

Father seeks reversal of the termination of his parental rights on the theory that the juvenile court did not make a detriment finding. The argument's patent defect is that the juvenile court *did* make a detriment finding, as evidenced by the reporter's transcript and the April 24, 2018 minute order. Father does not suggest that we can or should ignore this express finding of detriment. Having failed to attack the detriment finding for either legal or evidentiary sufficiency, father has waived his challenge to it. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811 [arguments not made are deemed waived or abandoned].)

Despite the waiver, we would be remiss if we ignored the fact that the juvenile court did not articulate the standard of proof when making its detriment finding.

Assuming for the sake of argument the issue is whether the juvenile court made its detriment finding by clear and convincing

evidence, it is conceivable father is arguing that the juvenile court did not, and that he suffered prejudice as a result within the meaning of *Chapman v. California* (1967) 386 U.S. 18, 24 [whether constitutional error is harmless beyond a reasonable doubt]). Any such argument fails for the following reason. When a new standard of proof has been recently announced, or where the issue of the applicable standard is unclear, a juvenile court must articulate the standard. (*In re Bernadette C.* (1982) 127 Cal.App.3d 618, 625.) "On the other hand, where the issue is well settled, it is presumed that the trial judge applied the appropriate standard and no articulation is required. [Citation.]" (*Ibid.*) *Santosky* was decided long ago in 1982. Because the *Santosky* rule is well established, the juvenile court was not required to articulate the standard of proof when making a detriment finding. Accordingly, we must presume the juvenile court correctly applied the law.

IV. The ICWA.

The parties agree that the juvenile court and Department did not inquire into father's possible Indian ancestry and thereby failed to comply with the ICWA.

The ICWA "protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. [Citations.] If there is a reason to believe a child that is the subject of a dependency proceeding is an Indian child, [the] ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396.) Federal and state law require that "notice [be] sent to the potentially concerned tribes," and that the notice include

available information about the maternal and paternal grandparents and great-grandparents. (*Ibid.*) A child welfare agency has an affirmative and continuing duty to obtain this information. (*Ibid.*)

When there is noncompliance with the ICWA in a dependency proceeding, it is appropriate to conditionally reverse an order terminating parental rights and remand the matter with directions to the juvenile court to comply with the ICWA. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 705.) If an Indian tribe intervenes after proper notice, case law requires a juvenile court to proceed in accordance with the ICWA. But if a child does not have any Indian ancestry, or if no Indian tribe intervenes, it is proper for the order terminating parental rights to be reinstated. (*Ibid.*)

DISPOSITION

The order denying the section 388 petition is affirmed. The order terminating parental rights is conditionally reversed with directions to the juvenile court to comply with the ICWA. If, after compliance with the ICWA, a tribe intervenes and claims minor as an Indian child, the juvenile court shall proceed in conformity with the ICWA. If, on the other hand, minor does not have any Indian ancestry or no tribe intervenes and claims minor as an Indian child, the order terminating parental rights shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT